

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID LAWRENCE JOHNSTON,)	No. CV-05-078-CI
)	
Petitioner,)	REPORT AND RECOMMENDATION TO
)	GRANT MOTION TO DISMISS
v.)	WITHOUT PREJUDICE
)	
CAROL PORTER, et al.,)	
)	
Respondents.)	
)	

BEFORE THE COURT on Report and Recommendation is Respondents' Answer and Memorandum of Authorities which the court construes as a Motion to Dismiss under Rule 8, Rules Governing § 2254 Cases. (Ct. Rec. 23.) Petitioner, who is proceeding pro se, is currently in the custody of the Washington State Department of Corrections at the Washington Corrections Center (WCC) at Shelton, Washington; Assistant Attorney General John J. Samson represents Respondent. The parties have not consented to proceed before a magistrate judge.

ISSUES

On June 18, 1998, following a jury trial, petitioner was convicted in Spokane County Superior Court of second degree felony murder (Count II), attempted second degree murder (Count III) (initially charged as attempted first degree murder), first degree robbery (Count IV), and second degree robbery (Count V). (Ct. Rec. 18, Ex. 1.) With respect to Count III, the trial court determined there was insufficient evidence of premeditation as to the initial

1 charge of attempted first degree murder, but permitted the
2 prosecution to instruct the jury on the lesser included crime of
3 second degree attempted murder. At sentencing, the trial court
4 merged the conviction for attempted second degree murder with Count
5 IV, first degree robbery.

6 Following review, the Court of Appeals concluded the trial
7 court had erred in merging Count III with Count IV and remanded for
8 re-sentencing to consider concurrent or consecutive firearm
9 enhancements and exceptional sentencing issues. That re-sentencing
10 has not yet occurred.

11 Following completion of collateral review, the Court of Appeals
12 vacated the conviction for second degree felony murder (Count II) in
13 light of *In re Andress*, 147 Wn. 2d 602, 56 P.3d 981 (2002)(assault
14 may not serve as the predicate crime for second degree felony murder
15 under former RCW 9A.32.050(1)(b) (1976)). (Ct. Rec. 18, Ex. 9.)
16 Respondent asserts as of July 22, 2005, a certificate of finality
17 has not been issued by the appellate court in the personal restraint
18 proceedings; additionally, Petitioner has not been charged at this
19 time with a second prosecution for the events alleged under Count
20 II.

21 Petitioner now seeks federal habeas relief, raising two claims:
22 (1) violation of double jeopardy based on the possibility of
23 retrial on the second degree felony murder charge, and (2) violation
24 of double jeopardy based on the trial court's decision to instruct
25 the jury on the lesser included offense of second degree attempted
26 murder. Respondent moves to dismiss both claims with prejudice
27 contending the first claim is not ripe because there has been no
28 decision to prosecute Petitioner on the events supporting the charge

1 of second degree felony murder. Additionally, Respondent asserts
2 this claim was not presented to the state courts and remains
3 unexhausted. Respondent also moves to dismiss the second claim
4 because the state court decision to instruct the jury on the lesser
5 included offense of second degree murder was not contrary to clearly
6 established Supreme Court law.

7 **FACTS**

8 The state court summarized the facts surrounding Petitioner's
9 convictions as follows:

10 Mr. Johnston, along with his friend, Aaron Simpson, was
11 involved in three separate events in Spokane during
12 September 1997. First, late on September 7, Mr. Simpson
13 knifed and killed Michael Flees; charges: Count I, second
14 degree murder; alternatively, Count II, second degree
15 felony murder. Second, early on September 8, the pair
16 robbed a Conoco mart where Mr. Simpson stabbed the clerk,
17 Mark Besserman; charges: Count III, attempted first degree
murder (amended at trial to attempted second degree
murder); and Count IV, first degree robbery. Third, about
two hours later the pair robbed a Texaco mart where Joshua
Tyree clerked; charge: Count V, second degree robbery.
Count VI alleged an assault on Shane Nelson for which Mr.
Johnston was acquitted. It will not be discussed except
necessarily. We turn now to the critical facts.

18 At about 8:30 p.m. on September 7, after an afternoon
19 of drinking, Mr. Johnston and Mr. Simpson, along with a
20 mutual friend, Brodie Dowd, ran into acquaintances Todd
21 Bridges and Shane Nelson. Allegedly, Mr. Simpson used a
22 knife and Mr. Johnston used his fists to assault Mr.
Nelson in a dispute related to Mr. Simpson's car. Mr.
Nelson testified about Mr. Simpson's use of a knife while
in Mr. Johnston's presence.

23 After the confrontation, all five men went to a
24 nearby motel. Mr. Simpson wanted to question Mr. Bridges
25 and Mr. Nelson about drugs missing from the car. Mr.
26 Johnston, Mr. Dowd, and Mr. Simpson then discussed robbing
someone to make up for the loss. According to Mr. Nelson,
Mr. Johnston was bragging about having "weapons under
control" and "nobody was going to mess with them."

27 Just before midnight the five men went to see a
28 friend on Crown Avenue. When they arrived, Mr. Simpson
and Mr. Bridges knocked on the door. No one answered.
Mr. Simpson walked back to the car; Mr. Bridges decided to

1 stay. Just then, a car sped by near Mr. Simpson's car.
2 Mr. Dowd threw up his arms in a gesture of "what is going
3 on." The driver of the speeding car, Michael Flees,
4 stopped and got out for reasons unclear. Mr. Nelson
5 testified Mr. Flees did not appear angry, and speculated
6 that Mr. Flees may have thought someone needed help. Mr.
7 Simpson, Mr. Dowd and Mr. Johnston approached Mr. Flees.
8 Mr. Simpson and Mr. Dowd attacked Mr. Flees. Mr. Johnston
9 got inside Mr. Flees's car, then stood by the driver's
10 door in a position that could be interpreted as preventing
11 Mr. Flees's escape. Mr. Simpson stabbed Mr. Flees. The
12 four remaining men then ran back to Mr. Simpson's car and
13 left. Mr. Flees bled to death near the scene.

14 The four men returned to the motel. Mr. Simpson, Mr.
15 Dowd and Mr. Johnston were bragging about the stabbing.
16 Mr. Nelson testified that Mr. Johnston never disagreed
17 with Mr. Simpson's actions or tried preventing them. Mr.
18 Johnston and Mr. Simpson continued to talk about
19 committing a robbery. Mr. Nelson decided to sneak away
20 from the others. Mr. Nelson and Mr. Bridges called the
21 police two days later giving information on the Flees
22 stabbing.

23 Mr. Johnston and Mr. Simpson decided to drive around.
24 At approximately 4:00 a.m. on September 8, they stopped at
25 a Conoco mart. Mr. Johnston went in first to get the key
26 to use the outside restroom. He returned with Mr.
27 Simpson. Both wore hoods over their heads and bandannas
28 around their faces. Mr. Johnston told the Conoco clerk to
give him the money out of the till. While Mr. Johnston
was taking the money, Mr. Simpson stabbed the clerk five
times in the neck and back. After they left, Mr. Simpson
disposed of the knife. Mr. Johnston testified it was not
until this point, ten minutes after the Conoco robbery,
that he realized Mr. Simpson had used the knife.

19 The men continued driving around looking for drugs to
20 purchase until Mr. Simpson received a page. At
21 approximately 6:00 a.m. they stopped at a Texaco mart
22 located across the street from the Conoco mart they had
23 robbed earlier. Mr. Simpson and Mr. Johnston entered the
24 store and demanded money. The two took money from the
25 till and cigarettes. They then told the clerk to get on
26 the floor. Mr. Simpson kicked the clerk in the back of
27 the head. They told the clerk not to call the police and
28 left. Mr. Johnston and Mr. Simpson were soon arrested.

25 When Mr. Johnston requested dismissal after the
26 State's evidence, the court denied all requests, except
27 for a newly added charge of attempted first degree murder
28 of the Conoco clerk. The court found no "sufficient
factual basis for premeditation." The State then
requested to amend the information back to attempted
second degree murder, arguing it was a lesser degree of

1 attempted first degree murder. The court granted the
2 State's request, concluding Mr. Johnston would not be
3 prejudiced because he had not yet put on his defense. Mr.
Johnston's counsel did not request intoxication
instructions.

4 Over Mr. Johnston's objections, the court gave
5 Instruction No. 8, on accomplice liability and Instruction
6 No. 16A, which provided the elements for attempted second
7 degree murder. Without objection, Instruction 16A omitted
8 the name of the Conoco clerk. The jury found Mr. Johnston
9 guilty of Count II, second degree felony murder; Count
10 III, attempted second degree murder; Count IV, first
11 degree robbery; and Count V, second degree robbery.
12 Counts II, III, and IV included special deadly weapon
13 verdicts.
14

At sentencing, the court merged the attempted second
degree murder conviction into the first degree robbery
conviction. The judge ran the underlying sentences
concurrently to each other and ran all the deadly weapon
sentence enhancements concurrently. The base sentence was
195 months, and one 24 month sentence enhancement was
added for a total 219 month sentence. Mr. Johnston
appealed. The State cross-appealed the merger and the
sentence.

15 *State v. Johnston*, 100 Wn.App. 126, 129-132, 996 P.2d 629, review
16 denied, 141 Wn. 2d 1030(2000).

17 **RIPENESS - NEW PROSECUTION; RESENTENCING**

18 Respondent first contends the claim raised as to the
19 possibility of retrial on the events comprising the felony murder
20 charge is not ripe because no prosecutorial decision has been made
21 as to whether Petitioner will be retried.

22 The Double Jeopardy Clause prohibits the government from
23 "punishing twice, or attempting a second time to punish criminally
24 for the same offense." *United States v. Ursery*, 518 U.S. 267, 273
25 (1996) (internal quotation marks omitted); see also U.S. Const.
26 Amend. V ("[N]or shall any person be subject for the same offence to
27 be twice put in jeopardy of life or limb"). The courts analyze two
28 questions with respect to double jeopardy claims: First, is the

1 second offense the "same" as the first? This question triggers the
2 test announced in *Blockburger v. United States*, 284 U.S. 299, 304
3 (1932) ("the applicable rule is that, where the same act or
4 transaction constitutes a violation of two distinct statutory
5 provisions, the test to be applied to determine whether there are
6 two offenses or only one is whether each provision requires proof of
7 an additional fact which the other does not"). Under *Blockburger*,
8 "[d]ouble jeopardy is not implicated so long as each violation
9 requires proof of an element which the other does not." *United*
10 *States v. Vargas-Castillo*, 329 F.3d 715, 720 (9th Cir.), cert.
11 denied, 540 U.S. 998 (2003); *U.S. v. Hickey*, 367 F.3d 888, 891 (9th
12 Cir. 2004), *opinion amended on other grounds*, 400 F.3d 658 (2005),
13 *petition for cert. filed July 6, 2005*.

14 The second question posed by the double jeopardy clause is
15 whether there has been an attempt to "punish twice." This question
16 triggers the test under *Hudson v. United States*, 522 U.S. 93, 99
17 (1997) (setting forth factors for determining whether a civil
18 penalty should be considered a criminal penalty).

19 A "colorable" double jeopardy claim "contest[s] the very power
20 of the Government to bring a person to trial, and the right would be
21 significantly impaired if review were deferred until after the
22 trial." *Abney v. United States*, 431 U.S. 651, 662 (1977) (pretrial
23 denial of dismissal of charge on double jeopardy grounds may be
24 appealed immediately). However, a claim of double jeopardy must at
25 least be "colorable." *United States v. Sarkisian*, 197 F.3d 966, 983
26 (9th Cir. 1999), *cert. denied sub nom, Mikayelyan v. United States*,
27 530 U.S. 1220 (2000). To be colorable, a double jeopardy claim must
28 have "some possible validity." *United States v. Price*, 314 F.3d

1 417, 420 (9th Cir. 2002). This issue would become ripe only if and
2 when the government attempts a second prosecution. *United States v.*
3 *Corona*, 34 F.3d 876, 882 (9th Cir. 1994); *United States v. Saccoccia*,
4 18 F.3d 795, 799 & n.3 (9th Cir. 1994), *cert. denied*, 517 U.S. 1105
5 (1996) (indictment triggers a colorable double jeopardy claim).
6 Similarly, double jeopardy claims as to the punishment prong do not
7 become ripe until punishment has been imposed. *United States v.*
8 *McKinley*, 38 F.3d 428, 430 (9th Cir. 1994) (finding that when a
9 double jeopardy claim focuses on double punishment, it is not ripe
10 for consideration when one sentence was not yet finalized and the
11 second conviction had not yet occurred). Here, Petitioner neither
12 has been re-charged nor re-sentenced; thus, his double jeopardy
13 claims are not ripe. Following a decision to re-prosecute and
14 completion of sentencing remand proceedings, Petitioner then may
15 pursue relief in the state courts if issues arise from those
16 proceedings.

17 As for the remaining exhausted issue involving the trial
18 court's instruction to the jury on the lesser included offense, that
19 conviction is also not final, as Petitioner is subject to re-
20 sentencing. Although Respondent advises the claim is exhausted and
21 may be reached on the merits, the Ninth Circuit has held in a case
22 in which an appellate court partially or wholly has reversed a
23 defendant's conviction or sentence and remanded to the district
24 court for further proceedings, the petitioner's "judgment does not
25 become final, and the statute of limitations does not begin to run,
26 until the district court has entered an amended judgment and the
27 time for appealing that judgment has passed." *United States v.*
28 *Colvin*, 204 F.3d 1221, 1225 (9th Cir. 2000); *see also Maharaj v.*

1 *Secretary*, 304 F.3d 1345, 1349 (11th Cir. 2002). Thus, the merits
2 of that claim may be addressed if Petitioner pursues federal habeas
3 proceedings following completion of state court proceedings.
4 Accordingly, **IT IS RECOMMENDED** Respondents' Motion to Dismiss (**Ct.**
5 **Rec. 23**) be **GRANTED** and Petitioner's claims be **DISMISSED WITHOUT**
6 **PREJUDICE**.

7 **OBJECTIONS**

8 Any party may object to a magistrate judge's proposed findings,
9 recommendations or report **within TEN (10) days** following service
10 with a copy thereof. Such party shall file written objections with
11 the Clerk of the Court and serve objections on all parties,
12 specifically identifying any the portions to which objection is
13 being made, and the basis therefor. **If it deems such a response**
14 **necessary, the court will direct the parties to respond to any**
15 **objections**. Attention is directed to FED. R. CIV. P. 6(e), which adds
16 another three (3) days from the date of mailing if service is by
17 mail.

18 A district judge will make a de novo determination of those
19 portions to which objection is made and may accept, reject, or
20 modify the magistrate judge's determination. The judge need not
21 conduct a new hearing or hear arguments and may consider the
22 magistrate judge's record and make an independent determination
23 thereon. The judge may, but is not required to, accept or consider
24 additional evidence, or may recommit the matter to the magistrate
25 judge with instructions. *United States v. Howell*, 231 F.3d 615, 621
26 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P. 73;
27 LMR 4, Local Rules for the Eastern District of Washington.

28 A magistrate judge's recommendation cannot be appealed to a

1 court of appeals; only the district judge's order or judgment can be
2 appealed.

3 The District Court Executive is directed to file this Report
4 and Recommendation and provide copies to Petitioner and counsel for
5 Respondent and the referring district judge.

6 DATED September 29, 2005.

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8 S/ CYNTHIA IMBROGNO
9 UNITED STATES MAGISTRATE JUDGE
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